Supreme Court, U.S.
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No. 96-821

In The

Supreme Court of the United States

October Term 1996

JONATHAN WOODNER CO., et al.,

Petitioners,

v.

FRANCISCA BREEDEN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Question related to jury selection identified in the Petition does not arise on the record in this action. Rather, were this Court to review the judgment below, the *only* jury selection issue that it would be called upon to decide would be the following:

Whether petitioners can make the "very obvious and exceptional showing of error," *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), that would justify this Court's review of the factual finding, concurred in by two courts below, that plaintiffs' counsel did not exercise peremptory strikes on a purposefully discriminatory basis.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Francisca Breeden, *et al.*, respectfully pray that the Court deny a writ of certiorari to review the judgment of the District of Columbia Court of Appeals entered in this proceeding on September 14, 1995.

STATEMENT OF THE CASE

A. First Intensive Factual Review

This sixteen year old civil case was filed in September of 1980, alleging tort claims by (then) thirteen plaintiffs against three owner-managers of a low and moderate income apartment building in Washington, D.C. The complaint alleged a plan to illegally intimidate, assault and force plaintiffs and other tenants from the apartment building so that it could be converted to a luxury condominium at a profit to the defendants of millions of dollars.

The petitioner-defendants filed counterclaims in response, including one that pointedly interjected and placed competing racial assertions at issue in the case. Defendants' counterclaims for libel, seeking $30 million dollars in damages, alleged that the tenants had defamed them by posting a sign accusing the defendants of racism, greed and a desire to lynch the plaintiff-tenants. In their

formal Reply to the counterclaim the tenants' defenses included the defense of "truth." (R. 314-15, 323-25)[1]

Judge Sylvia Bacon, an experienced and nationally recognized jurist, presided over two trials of the case, one year apart. The first trial resulted in a mistrial when defendant Jonathan Woodner died mid-trial. His estate was substituted as a party. Venirepersons for the second trial were advised that the trial was expected to take six weeks. Twenty-nine members of the venire then asked, in their response to a Juror Questionnaire, to be excused on hardship grounds. Of the twenty-nine, fifteen initially claimed an employment hardship. One of them, number 605 (a black woman), withdrew her employment hardship claim immediately upon being called to the bench for inquiry. **(Appendix 2a)** Plaintiffs' request to excuse numbers 642 (a white woman), **Appendix 5a**, and 631 (a white man), **Appendix 8a**, for "cause," because of their employment-hardship claims, was denied. Defendants *also* sought to strike number 642, for "cause," for the same reason, as well as number 627 (a black man).

The parties requested a six person jury, with six alternates. Each side was permitted three peremptories (a total of six) for selection of the primary jury. Of the twelve persons who potentially could serve as primary jurors, four (numbers 642, 631, 605 and 627) had initially expressed employment concerns – although 605 formally withdrew her employment hardship claim. Plaintiffs' first two peremptory strikes were against 642 (a white

---

[1] Record references ("R." or "Vol.") are to the twelve thousand page record filed with the District of Columbia Court of Appeals.

woman) and 631 (a white man). Before plaintiffs could exercise their third strike, defendants struck 627, a black man and the only remaining person (of the twelve who could potentially serve on the primary jury) who had claimed an employment hardship. Thus, each person who could have served on the primary jury and who made a work-hardship claim, either withdrew it or was struck.

Defendants nonetheless invoked *Batson v. Kentucky*, 476 U.S. 79 (1986), to allege plaintiffs' counsel had "stricken all caucasian jurors [i.e., 642 and 631] from the primary panel," because they were white. (Vol. VII at 6 (KK)). In partial explanation of his strikes, plaintiffs' counsel reminded the trial judge of the work concerns 642 and 631 had pressed on the court before strikes for "cause" were made.

Defendants then made two attempts to establish that plaintiffs' explanation was pretextual. Neither attempt involved a comparison of 642 and 631 to any of the six primary jurors, or involved a request that the trial judge make that comparison. Their first attempt compared 642 and 631 to all twenty-nine members of the venire who originally made hardship claims of any kind:

> The court will note that 90 percent of the jurors, probably 99 percent of the jurors who answered the questionnaire and approach[ed] the bench to explain particular hardships also indicated the same thing [as 642 and 631].

Defendants' second attempt consisted of pointing out that plaintiffs' second and third (of three) strikes during the selection of alternates were also directed to white

persons.[2] A single white juror served as one of six alternates.

Although jury selection took place in February of 1989, Judge Bacon foresaw, even then, the future development of the *Batson* doctrine. The eminent jurist excused the venire to consider the claim that plaintiffs' counsel violated *Batson* by using strikes to "remove[ ] from the jury the only white persons . . . who were available for selection to serve as the six primary jurors. . . . " Judge Bacon also took time to read *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), which anticipated this Court's extension of *Batson* to civil cases. She then *sua sponte* identified juror 605 (a black woman) and venireperson 627 (a black man) as the only persons (of the first twelve) at all similar to venirepersons 642 (a white woman) and 631 (a white man), who had not been struck by plaintiffs. (Pg. 59a of App. C to Petition) After making an extended oral comparative analysis of 605 (a white woman) with 631 (a black woman), and 642 (a white man) with 627 (a black man), Judge Bacon found that the black and white venirepersons were *not* similar "in the quality of their concern[,] in their devotion to their employment and their employer." (*Id.*) Having found plaintiffs' counsel's explanations were not pretextual, she found no discriminatory intent.

---

[2] The appellate record reveals that plaintiffs' first strike of an alternate was to number 665, a black woman who claimed a hardship because of an evening class. Their third strike of an alternate was to number 690, a white man. By virtue of the strike, 690 was replaced by 694, a white woman. Number 694 served as an alternate during the trial.

B. Second Intensive Factual Review

After plaintiffs' counsel delivered his Opening Statement to the jury, defendants moved for a "dismissal" on the grounds that the Opening Statement "emphasized the racial aspects" of this case. Because it was too early to determine whether plaintiffs would be able to present the evidence outlined in their Opening Statement, Judge Bacon took the motion under advisement [apparently as a "Sword of Damocles"] for the duration of the trial. Defendants renewed their motion at least three times during the trial. Each time Judge Bacon took the motion "under advisement."

Plaintiffs did present the evidence they promised. ("My closing argument has to be anti-climactic, because in my opening statement I attempted to outline for you what the evidence would be in this case. And I think I succeeded in almost every particular.") The trial resulted in judgments in favor of the plaintiffs on all claims, including the counterclaims for libel. At the conclusion of trial, defendants renewed their *Batson* claim as part of their respective post-trial motions to dismiss, for a mistrial or a new trial. None of the motions challenged the jury's verdict on the libel claims.

Judge Bacon awaited the transcription of the entire pre-trial and trial before ruling on the post-trial motions one year later. In a scholarly thirty-three page opinion the judge explained that she had the added advantage of "reviewing the transcript of the jury selection process in its entirety." (Pg. 33a of App. B to Petition) Based on her second exhaustive study and analysis of the facts, she concluded: "[T]he trial court adheres to its finding" regarding counsel's "neutral explanation." (*Id.* at 35a)

Judge Bacon also catalogued defendants' claims regarding plaintiffs' alleged appeals to "racial bias." After a thorough analysis of each claim, and comparison to the record, she found that "[a]lthough racial issues were part of the case, race was not exploited improperly." (*Id.*)

C. Third Intensive Factual Review

In their brief to the D.C. Court of Appeals defendants renewed their claim that plaintiffs pursued a two-part racial strategy at the trial (striking white potential jurors and making "appeals to racism" before the resulting all black primary jury). Their primary legal authority for their *Batson* claim became the intervening decision of the appellate court in *Tursio v. United States*, 634 A.2d 1205 (D.C. 1993). In that case the D.C. Court of Appeals held that in a "racially charged" case it is not enough that a striker can logically explain individual strikes. His explanation must be probed to determine why he treated any similarly situated black and white persons differently.

The adequacy of the record to support Judge Bacon's findings, based on her comparative analysis of jurors stricken and not stricken by plaintiffs' counsel, was a central theme of the petitioners' brief and oral argument in the Court of Appeals. The final colloquy in the oral argument demonstrates a clear understanding on the part of the court below that it should look at the record itself to determine whether Judge Bacon conducted the "probing" comparative analysis that *Tursio* requires:

> MR. SMITH: Let me comment now, briefly, if you'll let me, finally, about *Tursio*.

JUDGE STEADMAN: This is the last one, right?

MR. SMITH: The last point, your Honor.

JUDGE STEADMAN: All right.

MR. SMITH: But maybe the most important. The language of this court's decision, I would suggest to you, is indisputable that we have reversible error in this case. Given that he struck all whites from the jury, and given the powerful statistical case that was presented that these strikes were racially based. This court said:

> To rebut a prima facie showing as strong as appellant's, the prosecutor carried an especially heavy burden.

This court also said:

> The presence of black jurors who possess the same characteristic as the eliminated white jurors indicates, at least in the absence of other material differences, that the prosecutor's explanations were pretextual.

And this court finally concluded that in order to ensure that they were not pretextual, in order to ensure that the prosecutor, here plaintiffs' counsel, met his especially heavy burden, it was the trial court's responsibility to probe, in detail, the differences between the blacks who were not stricken and the whites that were. And it is not true that any such probing occurred on this record. And that creates reversible error.

JUDGE STEADMAN: Well, that last part will speak for itself because we have the transcript.

The appellate court's opinion addressed petitioners' claim that the voluminous record would reveal that: (1) "it is not true that any such probing occurred on this record" and that (2) appeals to race bias were made by plaintiffs. In a fourteen page published opinion issued six months later, *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929-943 (D.C. 1995), the court summed up its *de novo* review of the 12,000 page record by specifically refuting defendants' dual claims: "There is record support for the trial judge's findings that the tenants did not use peremptory challenges in a racially discriminatory manner, and that, while race was an issue, the case was presented to the jury in a 'reasonable manner . . . and race was not exploited improperly . . . ' " *Id.* at 933 n. 5. Among other supportive authorities, the court cited this Court's then-recent decision in *Purkett v. Elem*, 115 S.Ct. 1769 (1995). (*Id.*)

Although defendants subsequently petitioned for rehearing and rehearing *en banc*, their petitions did not challenge the panel's pointed rejection of their *Batson*-related claims.

REASONS FOR DENYING THE WRIT

There are five reasons why a writ of certiorari should not issue to review the judgment of the District of Columbia Court of Appeals. The first three reasons are the converse of the three reasons for review that the Petition claims: (1) any conflict among the appellate courts on the proper use of "comparative analysis" under *Batson* is irrelevant on *these* facts; (2) that issue is therefore not an

"important" one in the context of this case; and (3) for the same reason, this case does not present "compelling circumstances" for resolving the question presented in the Petition.

In addition, there are two affirmative reasons for denying review by certiorari: (4) this Court's "two-court rule" precludes review of findings of fact in which the trial and appellate court have concurred, absent the most exceptional circumstances, and (5) the decision of the trial judge is plainly correct and consistent with this Court's precedents.

For reasons of logic, we elaborate on the five reasons in reverse order.

I. THE DECISION OF THE COURT OF APPEALS IS PLAINLY CONSISTENT WITH THIS COURT'S PRECEDENTS

Respondents' record-studded Statement of the Case makes it plain that this is not a case where *any* appellate court's "comparative analysis," however rigorous, would result in a reversal. It was petitioners' burden to demonstrate that black seated jurors were treated differently than 642 and 631. *Purkett*, 115 S.Ct. at 1770-71. They failed to do so. When the trial judge attempted to do so for them, she found no seated jurors who were comparable to 642 and 631.

Number 627, the black male venireperson the trial judge selected for comparison, never even sat on the jury. The record makes clear he was struck by petitioners using their second peremptory strike, *before* plaintiffs had the

opportunity to strike him with their third peremptory. **(App. 14a)** Plaintiffs' failure to strike him could not be evidence of disparate treatment because he was not available to be struck with plaintiffs' third peremptory.

Number 605, the black female the trial judge selected, formally withdrew her claim of employment hardship before the peremptory strikes began. ("[T]hey can always get a temporary if they need it, you know.") She could not be compared to 642, who asserted that it was as important for her to report to work as it was for Judge Bacon to. ("Just like any of you missing six weeks of work, it would be the same way. You know, I feel like I have a responsible job at work.") In fact, the record shows that *petitioners* twice moved to strike 642, for cause, as a result. ("Your Honor, I believe what she has indicated [is] sufficient *cause* to strike her.") **(App. 6a)**

Nor could 605, who formally withdrew her hardship claim, be compared to 631. Even as the parties were exercising their peremptory strikes, number 631 was frantically working outside the courtroom to be excused from jury service. ("I spoke to my supervisors this morning. . . . They wanted to request that I be excused at this time. . . . We found out this morning we'll have to go through the [Librarian of Congress] . . . ") **(App. 10a)**

On appeal from the trial court's finding that the work-hardship explanation plaintiffs' counsel gave for striking 642 and 631 was credible, petitioners had to show that this finding of fact was "clearly erroneous." *Hernandez v. New York*, 111 S.Ct. 1859, 1869 (1991).

On this record they clearly could not make that showing. Even if the facts relevant to the finding were disputable, the clearly erroneous standard would not be met. *Id.* at 1871 ("[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.")

Similarly, the record reveals no basis for concluding that the trial and appellate court's finding that "race was not exploited improperly" during the trial was clearly erroneous. Petitioners placed their racial motivations at issue by filing a counterclaim for libel. They lost on their claim that plaintiffs libeled them by stating they were greedy, racists and that they wished to lynch people of color. Petitioners did not appeal that adverse judgment. It is the "law of the case."

II. THIS COURT'S "TWO COURT RULE" PRECLUDES A GRANT OF CERTIORARI TO REVIEW THE FINDINGS OF FACT

This Court has, since 1949, erected an even higher standard than "clearly erroneous" as a precondition for reviewing findings of fact when the findings have been concurred in by both a trial *and* appellate court:

> A court of law, such as this Court is, rather than a court for correction of error in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949); *Branti v. Finkel*, 445 U.S. 507, 512 n. 6 (1980) ("[W]e decline to review these and other findings

of fact petitioner argues were clearly erroneous."); *United States v. Ceccolini*, 435 U.S. 258, 273 (1978) (J. Rehnquist) (noting the Court's "traditional deference to the 'two court rule' "); *Exxon Co., U.S.A. v. Sofec, Inc.*, 116 S.Ct. 1813, 1820 (1996).

The record demonstrates the petitioners cannot hope to meet the "clearly erroneous" standard. Clearly, then, they cannot meet this heightened threshold standard for any review, at all, of the findings of fact concurred in by the trial court and the District of Columbia Court of Appeals.

III. THE CONFLICT THE PETITION CLAIMS HAS NO RELEVANCE TO THESE FACTS

In an effort to cloak what is unmistakably a request for a fourth review of the facts, petitioners have attacked the method used by the District of Columbia Court of Appeals to determine whether a trial court's findings of fact are clearly erroneous. Petitioners claim the method is insufficiently rigorous by comparison with the "comparative analysis" methodology, principally in use in the Third and Eighth Circuits. Petition at 9-10. The Petition claims that the question of the correct appellate review methodology is an important one and that this case presents "compelling circumstances" for resolving the issue.

Respondents have demonstrated, supra at 9-11, that no methodology would justify a different result on the facts in this record – none of the six seated jurors were at all "comparable" to venirepersons 642 and 631.

But, in fact, petitioners are also wrong on the law. The appellate review methodology used by the District of

Columbia Court of Appeals when there is a showing (not made by these petitioners in the trial court) that similarly situated prospective jurors of different races were treated differently, is *at least* as rigorous as that of the Third and Eighth Circuits.

In 1992 and 1993 the D.C. Court of Appeals *adopted* Third and Eighth Circuit precedent: (1) requiring a comparative analysis when there is a claim that identifiable, similarly situated venirepersons were treated differently for racial reasons, and (2) holding that if that "comparative analysis" results in a finding of disparate treatment, that finding is *per se* evidence that the reason given for the strike was pretextual.

The Eighth Circuit methodology was approved by the D.C. Court of Appeals in *Little v. United States*, 613 A.2d 880 (D.C. 1992). In *Little* the appellate court concluded the defendant had not made out a prima facie case of discriminatory strikes, but nonetheless cited Eighth Circuit authority on how the defendant *could* have established "an inference of discrimination" through use of a comparative analysis:

> In United States v. Johnson, the United States Court of Appeals for the Eighth Circuit held that the voir dire record established an inference of discrimination because the government struck black venirepersons at a disproportionate rate *'and struck blacks who did not respond during voir dire but did not strike whites who similarly did not respond.'* 873 F.2d at 1140.

Id. at 887. (emphasis added)

One year later, in *Tursio v. United States*, 634 A.2d 1205 (D.C. 1993), the D.C. Court of Appeals adopted *and applied* the comparative analysis methodology to reverse the trial court. *Id.* at 1212. In so doing, the court held that if a comparative analysis resulted in a finding that the seated juror and venirepersons being compared were similarly situated that was *per se* evidence that the reason given for striking one person and not the other was pretextual:

> The presence of black jurors who possess the same characteristics as the eliminated white jurors indicates, at least in the absence of other material differences, that the prosecutor's explanations were pretextual. See *Jones* v. *Ryan*, 987 F.2d 960, 973 (3d Cir. 1993).

Id.

The petition for certiorari cites the *Jones* decision, at page 10, for the view that the Third and Eighth Circuits "share this view" on the role of comparative analysis. However, the petition contends, in urging a grant of certiorari, that the Third and Eighth Circuits are at "one end of the spectrum" from the D.C. Court of Appeals in their approach. Petition at 9. This is an egregious and mystifying misstatement of District of Columbia law. If anything, *Tursio* goes beyond the Third and Eighth Circuits in its requirements. *Tursio*, 634 A.2d at 1212-1213 n. 7 ("We emphasize that the trial court must scrutinize every reason given . . . ").

A three judge panel of the D.C. Court of Appeals, such as the one that heard this case below, is bound by the prior decisions of predecessor three judge panels. *MAP v. Ryan*, 285 A.2d 310, 312 (D.C. 1971). For that

reason petitioners relied heavily on *Tursio*, as binding authority, in their brief and oral argument to the D.C. Court of Appeals.

Their petition to this court marks an abrupt about face. No D.C. case, much less *Tursio*, is cited in their petition. And despite their intimate familiarity with *Tursio* ("The last point, your Honor. But maybe the most important.") and the Third Circuit opinion on which it rests, petitioners now claim that the methodology used by the D.C. Court of Appeals for reviewing peremptory strikes is at the opposite extreme from Third and Eighth Circuit case law.

That is emphatically not the case. *See, e.g., Jefferson v. United States*, 631 A.2d 13, 15 (D.C. 1993) (*Batson* claim "demands the closest possible scrutiny by both the trial court and this court"); *Nelson v. United States*, 649 A.2d 301, 311 (D.C. 1994) (citing *Tursio's* presumption that a reason is pretextual when a comparative analysis results in a finding of disparate treatment of similarly situated venirepersons); *Epps v. United States*, 683 A.2d 749, 753 (D.C. 1996) ("In undertaking a *Batson* inquiry, the trial court must 'rigorously scrutinize[ ] the . . . race neutral explanations' offered to rebut the allegation of discrimination . . . ").

Whether this case had been argued on appeal to the Eighth Circuit or to the D.C. Court of Appeals the result, and method for determining whether the findings of fact were "clearly erroneous," would be the same. *See also Burks v. Borg*, 27 F.3d 1424, 1428 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1122 (1995) (irrelevant whether appellate court made "comparative analysis" if trial court did, and

appellate court reviewed findings of trial court using "clearly erroneous" standard).

Petitioners' real complaint is not with the method of appellate review, but with the findings that review confirmed.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the District of Columbia Court of Appeals should be denied.

Respectfully submitted,

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APPENDICES

Juror name Tonya Thompson Juror number 605

Address 1309 West Vir. Ave. NC

Joyner et al. v. Jonathan Woodner Company et al.

JUROR QUESTIONNAIRE

In order to assist the Court and counsel, please fill in the answers to the following questions. Please answer each question to the best of your ability. Remember that you are under oath.

1. Do you have any physical problems that might affect your ability to serve as a juror on this trial? (Circle one)

(No) Yes

2. This trial will last approximately six weeks. Will that cause any special hardship for you? (Circle one)

~~No~~ (Yes)

If yes, what is that hardship?

My Job is short of Help at this time.

3. What is your current occupation and by whom are you employed?

Dental Assistant (Dental Benifit Providers

4. If employed at your current job less than three years, what was your previous occupation?

Dental Assistant (Dr. Cyril ~~Brown~~ Brown DDS

5. If retired or unemployed, from what occupation?

N/A

6. What is your marital status? (Circle one)

married (single) widowed divorced separated

7. If married, what is your spouse's occupation?

N/A

EXAMINATION OF NO. 605

Vol. III at 119(HH)
February, 22, 1989)

THE COURT: The person in place seven is excused.

Next call your attention to the person in place nine, number 605.

MR. DILLON: I note that we would concur with excusing that witness.

THE COURT: Any objection to excusing number 605?

MR. RAUH: None, Your Honor. **(Pg. 119)**

MR. PEARSON: We'll oppose her being excused. The representation is, the job is short of help.

THE COURT: We'll ask number 605 to step forward, please.

Good afternoon. Could you assist us in explaining further what the shortness of assistance is at your job?

THE JUROR: I'm a dental assistant, and right now they do have a shortage of help, but they can always get a temporary if they need it, you know.

THE COURT: **There is no problem for you?**

THE JUROR: **Huh-uh.**

THE COURT: Any other questions of this prospective juror?

MR. WELLS: No.

MR. DILLON: No. **(Pg. 120)**

Juror name Suzanne Wells Juror number 642

Address 532 14th St NE

Joyner et al. v. Jonathan Woodner Company et al.

JUROR QUESTIONNAIRE

In order to assist the Court and counsel, please fill in the answers to the following questions. Please answer each question to the best of your ability. Remember that you are under oath.

1. Do you have any physical problems that might affect your ability to serve as a juror on this trial? (Circle one)

(No) Yes

2. This trial will last approximately six weeks. Will that cause any special hardship for you? (Circle one)

No (Yes)

If yes, what is that hardship?

I am a Supervisor at work & it will be difficult to be off.

3. What is your current occupation and by whom are you employed?

Supervisory Environmental Scientist, EPA, Superfund program

4. If employed at your current job less than three years, what was your previous occupation?

—

5. If retired or unemployed, from what occupation?

—

6. What is your marital status? (Circle one)

(married) single widowed divorced separated

7. If married, what is your spouse's occupation?

Energy consultant

EXAMINATION OF NO. 642 –

Vol. III at 131(HH)
(February 22, 1989)

THE COURT: The person in place 22 is excused.

Next I call your attention to the person in place 6 – place 24, juror 642. Her's is rather generalized. It would be difficult to be off – should we speak with her?

MR. PEARSON: Yes, Your Honor.

MR. WELLS: Yes.

THE COURT: We'd ask juror 642 to step **(Pg. 131)** forward, please. Good Afternoon, Miss Wells.

You indicated to us that it might be difficult for you to serve. What's the nature of your situation?

THE JUROR: Well, I have – I'm in the Superfund program. I'm working on a couple of major rules that we're putting out. We just published a proposed rule in December. I have a national conference I'm supposed to go to the first week in April. I'm scheduled to be in two weeks of supervisory training the second and third week of April. Um, you know, I manage five people right now. I have a lot projects going on.

THE COURT: We've waited a long time for Superfund. Maybe they can wait for us.

MR. RAUH: I'm glad it's still alive.

THE COURT: Are there questions, counsel?

MR. DILLON: None, Your Honor.

MR. PEARSON: Would that affect your ability to be a full-time, and pay attention to a trial of this length?

THE JUROR: I mean, you really have to be here every day for six weeks? **(Pg. 132)**

MR. PEARSON: At a minimum.

THE JUROR: I mean, I know you're here from. Everybody, it's hard to be away from your job, and it would be difficult. That's for sure. Just like any of you missing six weeks of work, it would be the same way. You know, I feel like I have a responsible job at work. But I'm sure a lot of other people do too.

THE COURT: Are there further questions from counsel?

MR. PEARSON: None, Your Honor.

THE COURT: Thank you.

Counsel wish to be heard?

MR. DILLON: Your Honor, I believe what she has indicated sufficient cause to strike her.

THE COURT: We'll leave that for the exercise of counsel's discretion.

Number 6 –

MR. DILLON: I have indicated, your Honor, and we would be agreeable to striking due to that.

MR. PEARSON: On 642, she indicated in one of her responses that she believed in replacing minority residents. Caveat, if they are compensated. We would suggest that is cause for **(Pg. 133)** excluding her.

THE COURT: 642 will be left to counsel's discretion. We're now on 644. 644 indicated that she has Jehovah's Witness activities. Inquiry or may she be excused? **(Pg. 134)**

EXAMINATION OF NO. 631 –

Supp. R. #5 at 5
(February 23, 1989)

MR. PEARSON: Your Honor, I did have potential questions about two of the jurors that may require – just those two exceptions that they be called forward and the judgment of the court the questions I raise are serious enough to warrant it.

THE COURT: Which numbers?

MR. PEARSON: Juror number 631, made a statement in his jury questionnaire regarding a special hardship. I don't recall that he was called to the bench, however, on yesterday, and said that he was under congressionally mandated deadlines to do research on national defense. He worked with the –

THE COURT: Well, I know we did not speak with him. The Court noted that he's an analyst at the Library of Congress which sounds like more of what we heard from those government offices. But I will be willing to ask him questions.

MR. PEARSON: Because he said it would raise national defense –. **(Pg. 5)**

MR. WELLS: Probably screening documents for the North Trial.

MR. PEARSON: I would request that he be questioned on that. . . . **(Pg. 6)**

THE COURT: Mr. Pearson? Do you have challenges for cause?

MR. PEARSON: We'll not have an opportunity to inquiry of 631 before exercising –

THE COURT: First let's do challenges for cause then I will bring all the jurors back in. We'll talk to the four – five we have to talk to and then you can deal here at the bench. I think we'll be more comfortable if we deal with the challenges for cause here without the jurors possibly overhearing us or the difficulty of hearing ourselves here at the bench.

MR. PEARSON: Well, as challenges for cause, we would challenge juror 631 for the reasons given that he at least perceives that he will not be able to, not be available to give his full-time and attention to the trial of this case because of his work obligations related to national defense.

THE COURT: You may inquire. Is there **(Pg. 10)** objection to cause?

MR. RAUH: Yes, Your Honor.

THE COURT: All right. We'll make inquiry of him then. . . . **(Pg. 11)**

* * *

THE COURT: Let me first say good morning members of the panel. Thank for your returning today. I know that some of you have returned with some difficulty. As you can hear, I am present here myself with some difficulty. But we are particularly grateful to you jurors to have – for your efforts to return and to assist us in selecting a jury to assist these parties in resolving their differences.

There are four of your number who appear to be absent. The Court would notify counsel that we are seeking the following persons: Place nine, place 18, place 28, and place 46. We'll wait a few minutes more to see if they respond.

We'll ask that the clerk also have them called at home. . . . **(Pg. 23).**

* * *

THE COURT: Thank you, sir. Is juror 631 available? Juror 631.

Mr. Roman, there was a request for further inquiry in light of your job situation. **(Pg. 34).**

THE JUROR: Yes.

THE COURT: What is your situation?

THE JUROR: Well, I spoke to my –

THE COURT: Library of Congress.

THE JUROR: Congressional research. I spoke to my supervisors this morning. It's primarily given the new Congress and the new administration, and I'm the only individual that handles specific areas of the defense budget. They wanted to request that I be excused at this time. We went through the process to – we found this morning that we'll have to go through the librarian in order to make an official request, though they offered the opportunity to contact my division chief or assistant chief to talk to them concerning the work load. But it's primarily the fact I'm the only one that works in conventional

military balancing and chemical weapons and arms control, and at this point, we are deluged. It's a matter of the length of the six weeks would create a problem.

THE COURT: Really think the Library of Congress they can read the brochure.

THE JUROR: Pardon?

THE COURT: It tells you if you have **(Pg. 35)** difficulty serving, how to deal with the system by making an application with a promise to serve at another time. Did you read it?

THE JUROR: Pardon me?

THE COURT: Did you read your notice?

THE JUROR: Well, I didn't know at the time that the duty would be for six weeks, you know. A week we could get by, but for six weeks during this part of the budget cycle, that is what creates the problem.

THE COURT: Questions, counsel?

MR. PEARSON: No, Your Honor.

MR. WELLS: No, Your Honor.

THE COURT: Thank you.

MR. PEARSON: Your Honor, I will note that we haven't been informed the jurors of the possibility of there being two parts of this trial and it going well beyond six weeks. **(Pg. 36)**

* * *

THE COURT: Next I would call your attention to the person in place 631. Parties wish to be heard?

MR. PEARSON: Your Honor, he clearly is **(Pg. 38)** [im]proper in the case of this kind of – given the sensitive nature of his work and indispensable of his sole position and a sensitive position. He's obviously indicating his unavailability for trial because of the length of this which is in excess of six weeks. He's now attempting through his employer to also get whatever documents necessary to get off the jury. Clearly I think both sides will be ill served by forcing him to not only serve six weeks but potentially two to three months.

MR. WELLS: Just as Court was able to round that personnel for xeroxing and for preparation of these questionnaires yesterday, I would think that the United States Government could make do with the absence of one individual.

THE COURT: The Court denies the challenge for cause. There was no showing that his work would interfere with his ability to be fair.

Next I would inquire –

MR. PEARSON: We didn't have a opportunity to ask him that question.

THE COURT: That's what he was here for.

THE COURT: Court next inquires about **(Pg. 39)** number 684.

* * *

[Number 684 is excluded, by agreement, and there is no motion as to number 698]

* * *

MR. PEARSON: Your Honor, we would ask leave to ask that question of 631. I thought it was forgone when he indicated the extraordinary lengths he already had gone to to try to get off the jury.

THE COURT: The Court will leave the matter to counsel's discretionary peremptory **(Pg. 40)** challenge.

PEREMPTORY STRIKES

February 23, 1989

MR. PEARSON: Your Honor, all nine plaintiffs have a total of three challenges, all three defendants will have a total of three challenges cumulative?

THE COURT: Correct. As to the first six, and then you have a challenges as to alternates.

MR. PEARSON: Three a piece.

THE COURT: Correct. First challenge?

MR. PEARSON: It would be to juror 631.

THE COURT: Place 18, number 631. That is one challenge.

MR. DILLON: Defense would strike juror number 597 in seat 8.

THE COURT: That's number 597, place 8.

MR. PEARSON: 642, seat 24.

THE COURT: Second challenge is 642 in place number 24.

MR. DILLON: Defense would strike juror number 627 located in seat 17.

THE COURT: Defense number two, seat 17, number 627.

MR. PEARSON: 652, seat 27.

THE COURT: Plaintiff's number three, 652, **(Pg. 42)** place 27.

MR. DILLON: Defense would strike juror number 658 located in seat 30.

MR. RAUH: Seat 30.

MR. DILLON: Yes.

THE COURT: Defense number three as to juror 658 in place 30, is that correct?

MR. DILLON: That's correct.

MR. PEARSON: Will the Court now call them to be seated or do we continue?

THE COURT: You may continue with your challenges.

MR. PEARSON: These are for the alternates?

THE COURT: Yes.

MR. PEARSON: And the jurors in the case are jurors 605, 608, 609, 612, 635, and 649.

THE COURT: Those are the first six that remain.

MR. PEARSON: They cannot be stricken?

THE COURT: Strike anyone you want.

MR. PEARSON: I thought we're now striking for alternates.

THE COURT: We've completed the three primary challenges. But no one asked us to **(Pg. 43)** prevent you from challenging anyone you wish on the list.

MR. PEARSON: So we don't know who the alternates are going to be?

THE COURT: They are the next six that remain when we finish exercising the challenges.

MR. PEARSON: 665, seat number 33.

THE COURT: Plaintiff's first challenge to alternate is number 665, place 33.

MR. DILLON: Defense would strike juror number 659 located in seat number 31.

THE COURT: Defense first alternate challenge is in seat 31, 659.

MR. PEARSON: 681 in seat 40.

THE COURT: Defense – I'm sorry. Plaintiff challenges 681 in seat 40.

That's plaintiff's alternate challenge number two.

MR. DILLON: Juror number 671, seat 35.

THE COURT: Defense alternate challenge two is to the person in seat 35, number 671.

MR. PEARSON: 690, seat 45.

THE COURT: Plaintiff's alternate challenge number three is to juror 690 in seat 45. **(Pg. 44)**

MR. DILLON: Your Honor, defense's third alternate would strike juror number 612 located in seat 13.

THE COURT: I'm sorry?

MR. DILLON: Juror number 612 located in seat 14.

THE COURT: These persons are our primary jurors. Now we strike alternates.

MR. DILLON: Okay. Is this – Oh, 612 remains.

THE COURT: Yes.

MR. DILLON: Defense would strike juror number 675 located in seat 37.

THE COURT: Defendant's alternate number three is to number 637 in seat 37.

THE COURT: Mr. Dillon, just so you don't misunderstand, as you're aware, the Court of Appeals holds that counsel must know who the alternates are when they exercise alternate challenges. However, when you are striking as to the primary ones, you don't have to waste a challenge if you don't want to use it to the primaries. You can challenge anywhere on the list on the first round until you come to the alternate. **(Pg. 45)**